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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, **ALLAN B. WEISS** IAS PART 2
Justice

HSBC BANK USA, NATIONAL ASSOCIATION, AS TRUSTEE FOR FBR SECURITIZATION TRUST 2005-3

Plaintiff,

-against-

OSWALD DANIELS, COLLEEN VERWAYNE, NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, NEW YORK CITY TRANSIT ADJUDICATION BUREAU, LAVERNE FRANKLIN, LORAINE FRANKLIN,

Defendants.

Index No: 5889/09

Motion Date: 7/16/15

Motion Seq. No.: 4

The following papers numbered 1 to read on this motion by defendant, Oswald Daniels, for a preliminary and permanent injunction enjoining the plaintiff from selling or transferring the subject property; vacating the default against the defendant pursuant to CPLR 5015(a)(4) and dismissing the complaint pursuant to CPLR 3211(a)(1),(7) and (8), or in the alternative scheduling a traverse hearing; vacating the Order of Reference and Judgment of Foreclosure and Sale of the court and granting defendants leave to file a late answer pursuant to CPLR 3012(d); vacating the Notice of Sale and granting attorney's fees.

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Order to Show Cause-Affidavits-Exhibits	1 - 5
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Upon the foregoing papers it is ordered that this motion is denied in all respects.

This action to foreclose a mortgage was commenced by filing on March 11, 2009. The affidavit of service reflect that the defendant, Daniels, was served with the Summons and Complaint and required notices on March 17, 2009 pursuant to CPLR 308(4) at the mortgaged premises and by mailing on March 19, 2009 an additional

copies of the papers served to him at the same address. The defendants Daniels and Verwayne did not serve an answer to the complaint.

On June 18, 2009 Daniels, together with a loan modification company, appeared in the Residential Foreclosure Conference Part the defendant. The case was released after the referee determined that a mandatory conference was not required since the loan was not a high cost, subprime or non-traditional loan and, thus not a "home loan" as defined in the statute.

Subsequently, the plaintiff obtained, by ex-parte application, an Order of Reference which was entered on August 10, 2009. Plaintiff served the defendants with Notice of Entry of the Order of Reference on August 26, 2009. The plaintiff moved by Notice of Motion on May 27, 2010 for a Judgment of Foreclosure and Sale. The unopposed motion was granted and Judgment entered on September 27, 2010.

The plaintiff then moved by Notice of Motion dated August 4, 2011 for substitution of a new affidavit of the amount due. On August 17, 2011, the first return date of the plaintiff's motion, the motion was adjourned to September 7, 2011 when defendant Daniels appeared at the calendar call and requested an adjournment to obtain an attorney. On September 7, 2011 defendants by their attorney, LaFleur A. David, Esq. and a Notice of Appearance and requested an adjournment. The motion was adjourned to October 12, 2011. On October 12, 2011 the motion was adjourned again to October 26, 2011 pursuant to a Stipulation executed by plaintiff's counsel and defendants' attorney, Mr. David. On October 26, 2011 the motion was submitted without opposition and granted by Order entered on December 2, 2011.

In response to plaintiff's Notice of Sale scheduling the foreclosure sale for June 19, 2015 the defendants[1], by new counsel, brought the instant Order to Show Cause dated June 18, 2015.

In support of their motion defendants submitted various documentary evidence, the affirmation of their new attorney and the affidavit of defendant, Daniels. Daniels asserts, inter alia, that he fell behind in the mortgage payments due to a substantial

[1]Although counsel claims he is appearing on behalf of both Daniels and Verwayne and there is reference to "defendants" in the papers, there is no affidavit from Verwayne regarding any issue raised in this motion.

decrease of income, and he was never served with the summons and complaint inasmuch as he did not reside at the mortgaged premises where services was made, but has always resided at 9 Patchen Ave., in Brooklyn and that he would like to reach a settlement with the bank.

When a defendant seeking to vacate a default judgment raises a jurisdictional objection pursuant to CPLR 5015(a)(4) and also seeks a discretionary vacature pursuant to CPLR 5015(a)(1), the court is required to resolve the jurisdictional question before determining whether it is appropriate to grant a discretionary vacature of the default under CPLR 5015(a)(1) (see Wells Fargo Bank, NA v Besemer, 131 AD3d 1047 [2015]).

The defendant, Daniels' motion to dismiss the complaint on the grounds of lack of personal jurisdiction is denied. A defendant may waive a personal jurisdictional defense by his or her actions (see NYCTL 1998-1 Trust v Prol Properties Corp., 18 AD3d 525, 525 [2005]; Boorman v Deutsch, 152 AD2d 48, 51 [1989]). "An appearance by a defendant in an action is deemed to be the equivalent of personal service of a summons upon him, and therefore confers personal jurisdiction over him, unless he asserts an objection to jurisdiction either by way of motion or in his answer" (Countrywide Home Loans Servicing, LP v Albert, 78 AD3d 983 [2010]; quoting Ohio Sav. Bank v Munsey, 34 AD3d 659 quoting Skyline Agency v Coppotelli, Inc., 117 AD2d 135 [1986][internal quotation marks omitted]; see Nat'l Loan Investors, L.P. v Piscitello, 21 AD3d 537 [2005]). Pursuant to CPLR 320(a), the defendant appears by serving an answer or a notice of appearance or by making a motion. A party can also appear by substantially participating in the litigation (see Sessa v Bd. of Assessors of Town of N. Elba, 46 AD3d 1163 [2007]).

The court records reflect that a Notice of Appearance was filed on behalf of both defendants, Daniels and Verwayne, on September 22, 2011 without raising lack of personal jurisdiction by motion pursuant to CPLR 3211(a)(8) or otherwise (see Matter of Nicola v Board of Assessors of Town of N. Elba, 46 AD3d 1161 [2007]). Having appeared in the action after their time to appear had expired without raising the jurisdiction, constitutes a waiver of the jurisdictional objection (see Castillo v JFK Medport, Inc., 116 AD3d 899, 900 [2014]) .

IN any event, Daniels' claim of lack of personal jurisdiction based on his assertion that he was not properly served in this case is without merit. "A process server's affidavit of service constitutes prima facie evidence of proper

service" (Mortgage Elec. Registration Sys., Inc. v Losco, 125 AD3d 733 [2015] quoting Scarano v Scarano, 63 AD3d 716, 716 [2009]; see NYCTL 2009-A Trust v Tsafatinos, 101 AD3d 1092, 1093 [2012]). "Although a defendant's sworn denial of receipt of service generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing, no hearing is required where the defendant fails to swear to specific facts to rebut the statements in the process server's affidavits" (Countrywide Home Loans Servicing, LP v Albert, 78 AD3d at 984-985 [internal quotation marks and citation omitted]; see Edwards, Angell, Palmer & Dodge, LLP v Gerschman, 116 AD3d 824, 825 [2014]; Simonds v Grobman, 277 AD2d 369, 370 [2000]). Here, the affidavit of service of the plaintiff's process server constituted prima facie evidence of proper service on the appellant pursuant to CPLR 308 (4) (see Wells Fargo Bank, N.A. v Final Touch Interiors, LLC, 112 AD3d 813, 814 [2013]; Gray-Joseph v Shuhai Liu, 90 AD3d 988 [2011]). The defendant, Daniels' claim that he did not reside at the mortgaged premises is insufficient to rebut the contents of the affidavit of service or to raise an issue warranting a traverse hearing since it was unsupported by any documentary evidence or an affidavit by any of the alleged residents at the premises (see Chichester v Alal-Amin Grocery & Halal Meat, 100 AD3d 820 [2012]; compare U.S. Bank, N.A. v Arias, 85 AD3d 1014, 1016 [2011 and also Toyota Motor Credit Corp. v Lam, 93 AD3d 713, 714 [2012]).

Nor are defendants entitled to a discretionary vacature of their default pursuant to CPLR 5015(a)(1) or leave to serve a late answer pursuant to CPLR 3012(d). A defendant seeking to vacate his or her default in answering the complaint pursuant to CPLR 5015(a)(1) and/or seeking to extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely pursuant to CPLR 3012(d) must provide a reasonable excuse for the default and demonstrate the existence of a meritorious defense to the action (see Eugene DiLorenzo, Inc. v A.C. Dutton Lbr. Co., 67 NY2d 138 [1986]; HSBC Bank USA, N.A. v Lafazan, 115 AD3d 647 [2014]; Stephan B. Gleich & Associates v Gritsipis, 87 AD3d 216 [2011]).

Since Daniels' only offered lack of personal jurisdiction as his excuse for failure to serve an answer, and the court has determined that jurisdiction exists, he has failed to demonstrate a reasonable excuse for his default (see Community West Bank, N.A. v Stephen, 127 AD3d 1008, 1009 [2015]; HSBC Bank USA, Nat. Ass'n v Miller, 121 AD3d 1044, 1046 [2014]). Thus, it is unnecessary to determine whether Daniels demonstrated the existence of a potentially meritorious defense (see Wells Fargo

Bank, N.A. v Cervini, 84 AD3d 789 [2011]; HSBC Bank USA, N.A. v Roldan, 80 AD3d 566, 567 [2011]). With respect to the defendant, Verwayne, she has failed to submit any excuse for her failure to answer.

In addition, defendants have been aware of the foreclosure action since 2009, having appeared at the foreclosure settlement conference and being served with Notice of Entry of the Order of Reference, and knew that plaintiff had obtained a Judgement of Foreclosure and Sale at least since 2011, however, they failed to move to vacate their default or for leave to serve a late answer for over five years and only after being served with the Notice of Sale (see HSBC Bank USA, N.A. v Ashley, 104 AD3d 975, 976 [2013] leave to appeal dismissed, 21 NY3d 956 [2013]). Such conduct evinces an intentional default, which is not excusable (see Dimopoulos v. Caposella, 118 AD3d 739, 741 [2014]; Vardaros v Zapas, 105 AD3d 1037, 1038 [2013]; Ujeta v Wu, 303 AD2d 676 [2003]).

In view of the defendants failed attempt to vacate their default in answering and vacature of the Judgment of Foreclosure and Sale, as parties in default they are not entitled to affirmative relief (see U.S. Bank Natl. Ass'n v Gonzalez, 99 AD3d 694[2012]; Deutsche Bank Trust Co., Am. v Stathakis, 90 AD3d 983[2011]; Holubar v Holubar, 89 AD3d 802[2011]; McGee v Dunn, 75 AD3d 624, 624[2010]).

Accordingly, the remainder of the defendants' motion, including the branch seeking a temporary or preliminary or permanent injunction, is denied.

Dated: October 29,2015
D# 52

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J.S.C.